BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-290 (Sub- No. 311X)

NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION –
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MARYLAND

REBUTTAL TO NORFOLK SOUTHERN'S MAY 19, 2010 REPLY
REBUTTAL TO MTA'S MAY 20, 2010 REPLY

1. I, Zandra Rudo, herewith provide my Rebuttal to Norfolk Southern Railway Company's ("NSR") May 19, 2010, and to the Maryland Transit Administration's ("MTA") May 20, 2010 Reply to my Reply to James Riffin's Petition to Reopen.

2. 49 CFR 1104.13(c) states that a reply to a reply is not permitted. In spite of this prohibition, both NSR and the MTA filed a reply to my Reply to James Riffin's Petition to Reopen. In NSR's Reply, (see pp. 10-13) it argued that the proper procedure is to disregard the Board's rules, then if someone objects, to seek permission to violate the rules after the violation has occurred. Other Class I carriers take this a step farther: Ignore and / or make misrepresentations to the Board, then argue that it was

inadvertent, or the complaining party's fault, when someone objects. (Conrail: numerous abandonments without Board or ICC permission; Canadian National: state that there were 30 at-grade road blockages during a two-month period, when there were more than 1,400. NSR: misquote what other parties state.)

3. Rather than ignore the Board's rules, I have, and will continue to try to comply with the Board's rules.

4. As previously stated, a reply to a reply is not permitted without permission from the Board. Evidently the procedure is to file the reply, argue that the reply would make the record more complete, then ask the Board to accept it.

5. In its May 19, 2010 Reply NSR materially misrepresented what I said in my May 14, 2010 Reply. In its May 20, 2010 Reply, the MTA made a number of representations inconsistent with its previous representations. In order to make the Record more accurate and complete, I would ask that the Board accept this reply.

REBUTTAL TO NSR'S MAY 19, 2010 REPLY

6. In ¶A on p.5 of NSR's Reply, NSR *misrepresented* that I had failed to make a 'due process' claim.

Rebuttal: In ¶8 on p.3 of my May 14, 2010 Reply I stated:

"8. *This failure to permit Delmont, Lowe and I to actually participate* meaningfully, and to submit evidence to the STB regarding our interest in preserving the CIT for our freight rail needs, and the interest in freight rail service of six other shippers, *denied us our "opportunity to respond," Roadway Express,*

op. cit., and thus ***denied us our Due Process Right to participate*** in the proceeding. It ***was an egregious violation of my Due Process Rights*** to strike my Notice of Intent to Participate as a Party of Record, ***to abrogate my Due Process Right*** to submit comments and evidence of shipper interest in the CIT, and to exempt the proceeding from the OFA procedures before I was given an opportunity to participate in a meaningful way." (Bold added.)

7. I believe that what I said clearly would constitute a 'claim' that my Due Process Rights were violated by the Board.

8. On p.4 of NSR's Reply, NSR made the following *misrepresentation*:

"NSR would note, however, that the ***allegation in the Rudo Petition*** at paragraphs 36-44 that the MTA and / or NSR ***did not adhere to Federal Railroad Administration ("FRA") requirements*** is completely irrelevant to the prosecution or defense of an abandonment case." (Bold added.)

9. I ***did not*** allege that the MTA or NSR "did not adhere to Federal Railroad Administration ("FRA") requirements." I ***did allege*** that the MTA lied to the Board in the *Maryland Transit Administration – Petition for Declaratory Order*, STB Finance Docket No. 34975, proceeding when the MTA stated in its April 20, 2008 Reply:

"MTA has taken no actions that would prevent Norfolk Southern Railway Company ... from fulfilling its obligation to provide common carrier service on the line."

10. My allegation was supported by FRA documents which indicated that the MTA ***willfully failed to renew*** its 2001 FRA waiver, which waiver was required even though NSR operated its freight trains during those hours when the MTA's light rail system was not using the Line. The MTA's failure to renew its 2001 FRA waiver had the result of making it illegal for NSR to operate on the Line, thus materially interfering with NSR's ability to provide freight rail service to Cockeysville. This interference with NSR's ability

to provide service on the Line undermined the STB's holding that the MTA did not have a residual common carrier obligation. And if the MTA does in fact have a residual common carrier obligation, then it is unlawful for the Board to grant abandonment authority without first addressing the issue of whether the MTA does in fact have a residual common carrier obligation on the Line.

11. A second issue is the Cockeysville Industrial Park Track ("CIPT"). The MTA did not seek, nor was it granted, an exemption due to its *1997* acquisition of the CIPT. Tracks which serve more than one shipper are line, not industrial tracks. See e.g. *United Transp. Union – Illinois v. Surface Transp.*, 169 F.3d 474, 477 (7th Cir. 1999) ["*Chicago Rail Link*"] and *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999) [*"Effingham"*]. To date, the issue of whether the CIPT is a line of railroad, or excepted track, has not been decided. In addition:

> "Whether a particular stretch of rail is a line of railroad, or is an extended line of railroad or is a spur, industrial, team, switching or side track, is a mixed question of law and fact *to be determined judicially rather than administratively. United States v. Idaho*, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070." (Bold added.) Quoted in *New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 164 (5th Cir. 1966).

REBUTTAL TO MTA'S MAY 20, 2010 REPLY

12. The MTA has emphasized "that safety of its operations requires unfettered access to this track 24 hours per day." May 20, 2010 Reply at 5.

13. Safety is subject to the exclusive jurisdiction of the Federal Railroad Administration. The STB has repeatedly stated that it has no jurisdiction over safety issues. *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, FD No. 34914, p. 16, Served May 7, 2010. Consequently, 'safety' issues cannot form the basis for

exempting a line from the OFA procedures.

14. In its 2000 FRA waiver application, when the CIT was single-tracked, the MTA represented that there were no safety issues due to NSR's operation on the CIT. The FRA issued the MTA a waiver from the FRA's regulations, having found that NSR's operation on the CIT did not present any safety issues. In its *Petition for Declaratory Order*, FD. No. 34975, the MTA represented that its use of the CIT would not "unreasonably interfere with freight rail service." In the STB's September 19, 2008 decision in FD No. 34975, the STB found that the "MTA is committed to allowing fixed hours of freight operation and to expanding those hours if market demands so warrant." The MTA is judicially estopped from arguing before the STB that using the CIT for freight operations creates safety issues, or in any manner interferes with its operations on the CIT.[1] In addition, whatever minor safety issues that may have existed in 2000 (too minor to concern the FRA), were eliminated when the line was double-tracked.

15. If there are any significant safety issues due to the MTA's use of the Line, then those safety issues, if not resolved by the MTA, would interfere with NSR's ability to provide freight service on the Line. And if any safety issues due to the MTA's use of the Line interfere with NSR's ability to provide service on the Line, then the MTA acquires residual common carrier obligations on the Line. And if the MTA has a residual common carrier obligation, then the Line cannot be abandoned.

16. I certify under the penalties of perjury that the above is true and correct to the best of my knowledge, information and belief.

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[1] Judicial estoppel has 3 elements: (1) Asserting a position factually incompatible with a position taken in a prior proceeding; (2) the prior position was adopted by a tribunal; (3) the party takes an inconsistent position in a later proceeding. *King v. Herbert J. Thomas Memorial Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998).

Executed on May 20, 2010.

Respectfully submitted,

Zandra Rudo

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2010, a copy of the foregoing Response, was served by first class mail, postage prepaid, upon John Edwards, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241, Charles Spitulnik, Kaplan Kirsch, Ste 800, 1001 Connecticut Ave NW, Washington, DC 20036, and was hand delivered to Carl Delmont, James Riffin and Lois Lowe and was served via e-mail upon Eric Strohmeyer.

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